# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>April 8, 2003 |
| v | No. 239270<br>Genesee Circuit Court |
| HOWARD MCKENNA BRAY,<br><br>Defendant-Appellant. | LC No. 01-008622 |

Before: Gage, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of assault with a dangerous weapon, MCL 750.82, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to thirty to seventy-two months' imprisonment for the assault conviction, thirty to ninety months' imprisonment for the concealed weapon conviction, and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm. This appeal is being heard without oral argument pursuant to MCR 7.214(E).

This case arises out of a gang-related street shooting, wherein the victim was shot in the neck and survived. It is unnecessary for us to discuss the factual circumstances of the crime because the only issue presented on appeal is whether defendant's convictions for both felony-firearm and carrying a concealed weapon violated his constitutional right to be free from double jeopardy.

In *People v Colon,* 250 Mich App 59, 62; 644 NW2d 790 (2002), this Court, addressing a double jeopardy issue, stated:

> The United States and the Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15. In other words, the Double Jeopardy Clause "protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense." *People v Squires,* 240 Mich App 454, 456; 613 NW2d 361 (2000).

Our Supreme Court in *People v Denio,* 454 Mich 691, 707-708; 564 NW2d 13 (1997), distinguishing the tests for double jeopardy under the United States and Michigan Constitutions,

stated that under *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932), if the same act or transaction constitutes a violation of two distinct statutory provisions, the federal test is whether each provision requires proof of a fact which the other does not. This test typically results in a double jeopardy violation where one is punished for a greater offense and a lesser included offense. *Denio, supra* at 707. If the *Blockburger* test is satisfied, a presumption arises that the Legislature did not intend to punish the defendant under both statutes. *Id.* However, the presumption is rebutted by a clear indication that the Legislature intended punishments under both statutes. *Id.*

The *Denio* Court further stated that "[t]his Court has rejected the *Blockburger* test in analyzing the Double Jeopardy Clause of the Michigan Constitution, and instead uses traditional means to determine the intent of the Legislature, such as the subject, language, and history of the statutes." *Id.* at 708.

With regards to the crimes of felony-firearm and carrying a concealed weapon, our Supreme Court has definitively held that state and federal double jeopardy protection is not violated if a defendant is tried, convicted, and sentenced for both crimes arising out of a single criminal transaction. *People v Sturgis*, 427 Mich 392, 405-406; 397 NW2d 783 (1986). In *Sturgis, id.*, the Supreme Court stated:

> We find that in the case sub judice the Legislature clearly intended to authorize punishment over and above, and in addition to, that otherwise provided, where a defendant carried a weapon in the course of a felony. We conclude that a concealed weapon conviction and a felony-firearm conviction may be obtained in the same trial growing out of a single criminal episode when the felony-firearm conviction is based on a distinct felony.

Here, the felony-firearm conviction was predicated on the distinct felony of assault with a dangerous weapon. Discussing further the legislative intent, the *Sturgis* Court stated:

> The conduct made punishable under the felony-firearm statute, is not the mere possession of a firearm. Rather, it is possession of the firearm *during the commission of or attempt to commit a felony* that triggers a felony-firearm conviction. The conduct made punishable by the concealed weapon statute is likewise not the possession of a firearm, it is the carrying of a weapon, concealed. Each statute is directed at a distinct object which the Legislature seeks to achieve through the imposition of criminal penalties. Where the act giving rise to the predicate felony is distinct from the act giving rise to the concealed weapon felony, both convictions are authorized by the Legislature. [*Id.* 409-410 (emphasis in original).][1]

Here, the assault, firing the weapon at the victim, was distinct from the act of carrying the concealed weapon prior to the shooting.

---

[1] This Court ruled similarly in *People v Peyton*, 167 Mich App 230, 234-235; 421 NW2d 643 (1988).

Defendant acknowledges the Supreme Court's decision in *Sturgis*, but essentially requests us, the Court of Appeals, to reject it. This is beyond our authority. "[I]t is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until this Court takes such action, the Court of Appeals and all lower courts are bound by that authority." *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993). Moreover, defendant's assertion that the *Sturgis* Court "did not really explain" how the relevant statutes served distinct social purposes lacks merit. The Court specifically found that the purpose of the concealed weapon statute was to discourage persons from carrying a concealed weapon, whereas the felony-firearm statute was enacted for the purpose of discouraging the use of a weapon during the course of a felony, the statutes are directed at distinct social evils. *Sturgis, supra* at 408-409. We disagree with defendant that further delineation was necessary.

Additionally, defendant's claim that the *Sturgis* Court should have considered *Ball v United States*, 470 US 856; 105 S Ct 1668; 84 L Ed 2d 740 (1985), lacks merit. Once again, we are without authority to dissect and reject *Sturgis*, and regardless, *Ball* is entirely distinguishable, where the two crimes there involved receipt of a firearm by a convicted felon and possession of a firearm by a convicted felon. *Ball, supra* at 857-858. The United States Supreme Court in *Ball* found that Congress intended that a felon be convicted and punished for only one of the two offenses if they arose from the same criminal episode because a felon who receives a firearm must also necessarily possess the firearm. *Id.* at 861-862. With regard to the case sub judice, one who conceals a firearm does not necessarily use the firearm during the commission of a felony, and one who uses a firearm during a felony does not necessarily carry and conceal the weapon.

Finally, defendant's reliance on *People v Mitchell*, 456 Mich 693; 575 NW2d 283 (1998), is misplaced. The holding in *Mitchell* simply noted that a felony-firearm conviction could not be predicated on the felony of carrying a concealed weapon pursuant to the specific language contained in MCL 750.227b(1). *Mitchell, supra* at 698. Here, the predicate felony for the felony-firearm conviction was not carrying a concealed weapon but assault with a dangerous weapon.

Affirmed.

/s/ Hilda R. Gage
/s/ William B. Murphy
/s/ Kathleen Jansen